MOHD NAZIR BADAR SHAIR

v.

TIMBALAN MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPLICATION NO: 44-43-99]
24 MARCH 2000

EVIDENCE: *Affidavit - Jurat - Positioning - Whether may begin and end on fresh page - Indorsement - Dates of swearing and filing affidavit - Leave of court - Entitlement - Whether jurat or only affidavit must carry title of action - Rules of the High Court 1980, O. 41 rr. 1 & 9(2) - Evidence Act 1950, s. 114(e)*

CRIMINAL PROCEDURE: *Habeas corpus - Proper procedure - Affidavit - Whether must be made by detainee - Whether and when may be made by some other person - Sufficient cause - Meaning of - Difficulty or inconvenience - Evidence of - Criminal Procedure Code, s. 367*

This was a motion for a writ of *habeas corpus* filed by the applicant against the three respondents. The respondents had filed a total of 11 affidavits in support of their case. Counsel for the applicant raised the preliminary objection that three of the affidavits filed by the respondents were defective as the jurats were not properly placed, in that in certain enclosures, namely 12 and 17, the jurat began on the page where the substantive part of the affidavit ended and concluded on a fresh page, and in encl 13 the jurat was on a completely new page.

There was also an objection raised by the senior federal counsel based on s. 367 of the Criminal Procedure Code ('CPC') *ie,* that the affidavit in support of the motion should have been affirmed by the person detained and not his mother.

Among the issues for consideration were: (a) whether the jurat of an affidavit may begin and end on a fresh page; (b) whether a jurat must carry with it the title of the action; and (c) the interpretation of s. 367 of the CPC.

Held:

[1] There is no provision in the Rules of the High Court 1980 ('RHC') on the positioning of a jurat. There is thus no legal basis for declaring a jurat defective if it does not end on the last page of an affidavit. Furthermore, O. 41 r. 9(2) of the RHC states that "every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without leave of the court."

[1a] The indorsement must be made at the end of the jurat. This will show that the jurat, even though beginning and ending on a new page or is on a completely new page, relates to the deposition in question and that the affidavit is regular. The object of the indorsement is precisely for that purpose.

[2] The affirmation and filing of an affidavit are official acts which will attract s. 114(e) of the Evidence Act 1950 which provides that the court may presume that judicial and official acts have been regularly performed. The signature of a Commissioner for Oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved.

[3] There is no requirement in O. 41 r. 1 of the RHC or in Form 78 for a jurat to be entitled. It is the affidavit and not the jurat that must carry the title of the action.

[4] Section 367 of the CPC states that "the affidavit required … shall be made by the person detained or alleged to be detained unless it be shown that by reason of restraint or coercion or other sufficient cause he is unable to make it, in which case it shall be made by some other person." The words 'sufficient cause' appearing in s. 367 CPC must be interpreted to mean 'some cause that is out of the control or influence of the applicant.' This is because the phrase 'sufficient cause' is preceded by the word 'other' which, on the application of the *ejusdem generis* rule of construction, must be interpreted in line with the phrase 'restraint or coercion'. The latter phrase refers to something that is out of the control or influence of a detainee and thus the words 'other sufficient cause' must be given a similar meaning.

[4a] Although difficulty or inconvenience in getting a detainee to affirm the affidavit falls within the words 'other sufficient cause', there must be positive evidence of such difficulty or inconvenience. This is because the contents of an affidavit prepared by a person other than a detainee will contain hearsay evidence. The reasons advanced by the applicant's mother to explain why she had to affirm the affidavit did not satisfy the requirement of the section.

[Motion denied.]

Case(s) referred to:
Commissioners of the Municipality of Malacca v. Sinniah [1974] 1 MLJ 77 ***(refd)***
Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 ***(not foll)***
Jugraj Singh & Anor v. Jaswant Singh & Ors AIR [1971] SC 761 ***(refd)***
Kassim Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303 ***(refd)***
Lim Bua v. Ng Kian Heng [1993] 2 CLJ 461 ***(refd)***
Lim Yew Sing v. Hummel International Sports & Leisure A/S [1996] 4 CLJ 784 ***(refd)***
Syed Ali Mohamed Kutti v. Menteri Dalam Negeri Malaysia & Anor [1998] 2 J Cr 449 ***(foll)***
Voon Mow Chen v. Menteri Dalam Negeri & Anor [1993] 4 CLJ 195 ***(not foll)***
Wan Othman Datuk Wan Yusuf v. Kewangan Utama (M) Bhd [1993] 2 CLJ 572 ***(refd)***
Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor [1999] 5 MLJ 180 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 367
Evidence Act 1950, s. 114(e)
Rules of the High Court 1980, O. 41 rr. 1(1), 5, 9(2)

Other source(s) referred to:
Black's Law Dictionary, 7th edn

For the applicant - Tabian Tahir; M/s Tabian Tahir & Co
For the respondents - Kamaludin Md Said SFC

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

This is a motion for a writ of *habeas corpus* filed by Mohd Nazir bin Badar Shair ("the applicant") against the three respondents. The motion was supported by an affidavit affirmed by the applicant's mother, one Che Ton binti Judin. The respondents filed a total of 11 affidavits in support of their case.

When the motion was called up for hearing before me on 13 March 2000 learned counsel for the applicant raised a preliminary objection to the effect that three of the affidavits filed by the respondents were defective as the jurats were not properly placed. The three affidavits are encls. 12, 13 and 17 of the court file. In support of his objection he relied on the case of *Voon Mow Chen v. Menteri Dalam Negeri & Anor* [1993] 4 CLJ 195. In his reply the learned senior federal counsel contended that the Rules of the High Court 1980 ("the RHC") do not say that the whole jurat must be on the same page. He then proceeded to raise a preliminary objection himself with respect to the affidavit filed in support of the motion. He referred to the case of *Syed Ali bin Mohamed Kutti v. Menteri Dalam Negeri Malaysia & Anor* [1998] 2 J Cr 449 and contended that the affidavit affirmed by the applicant's mother does not comply with the requirements of s. 367 of the Criminal Procedure Code.

I shall first deal with the objection raised by the applicant. In the case of encls. 12 and 17 the jurat begins on the page where the substantive part of the affidavit ends and concludes on a fresh page. In the case of encl. 13 the jurat is on a completely new page. This, as contended by learned counsel for the applicant, offends the proposition laid down in *Voon Mow Chen* where Vincent Ng JC (as he then was) said at p. 198:

> It is this Court's view that the reason that the jurat of an affidavit should not begin and end on a fresh page but rather should immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the jurat relates directly to the deposition. This is also in order to obviate the possibility of abuse by any party who may pre-execute jurats of affidavits in the absence of any averments for attachment to subsequently prepared averments. On account of this, it was held in the case of *Amanah International Finance Bhd v. Thien Juk Cheung & Ors* Suit No KG 392 of 1986 (High Court Kuching, Haidar J) 4 September 1989 that the affidavit of X was defective as the jurat of the affidavit began and ended on a fresh page and did not follow immediately after the end of the deposition. I wholly agree and subscribe to the ratio in this case and I hold to be defective, such similar affidavits filed by the respondent here.

It is my view that it is the ratio of this ruling, that is to say, that the jurat of an affidavit should not begin and end on a fresh page, which would compel a person to ensure that the jurat begins immediately after the end of the substantive part of the affidavit notwithstanding the part of the page where it ends. In such circumstances there is every possibility that the jurat will spill over onto the next page as has happened in this case in encls. 12 and 17. If this is also to be penalised a person who drafts an affidavit will have to take meticulous care to ensure that the substantive part of the affidavit ends at the top of the last page so as to leave sufficient space

on the same page to accommodate the whole jurat. Thus a drafter may find himself in the unenviable position of adding additional, though irrelevant, material to his affidavit or removing matters that are relevant in order to make room for the jurat. Alternatively, he may land up using up precious time in adjusting the spacing of the various paragraphs of his affidavit so as not fall foul of the law. It may be comparatively easier to achieve this result with a word processor. But it must be remembered there are still many, particularly the petition writers, who use typewriters to prepare affidavits. They will end up retyping an affidavit several times in order to ensure that the jurat is not on a new page. It is superfluous to reiterate the technical and practical problems that such an exercise will entail. The first reason advanced in *Voon Mow Chen* for the ruling that the jurat must not be on a new page is that it may not be a sufficient indication that the jurat relates directly to the deposition. This, to my mind, cannot be sustained as the whole affidavit including the jurat is stapled together and filed which would be sufficient indication that the jurat does, in fact, relate to the deposition. The second reason advanced in *Voon Mow Chen* relates to the possible use of pre-executed jurats to subsequent affidavits. If this argument is stretched a bit further then just as there may be a possibility of pre-executed jurats being used for subsequent affidavits it is equally possible that the extra space left in order to ensure that a jurat does not commence on a new page can be subsequently filled up. There will be no end to such possibilities. It is my view that rulings must be made on evidence and not on mere possibilities. Alternatively, a ruling must be based on what is expressly provided or prohibited by the RHC. There is no provision in the RHC on the positioning of the jurat with the result that there is no legal basis for declaring a jurat as being defective if it does not end on the last page of an affidavit. Notwithstanding what I have said the difficulties envisaged in *Voon Mow Chen* have in fact been resolved by O. 41 r. 9(2) of the RHC which reads as follows:

> Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

The indorsement must be made at the end of the jurat. This will show that the jurat, even though beginning and ending on a new page or is on a completely new page, relates to the deposition in question and that the affidavit is regular. It is my view that the object of the indorsement is precisely for that purpose thereby negating the problems alluded to thusfar.

Be that as it may, the affirmation and filing of an affidavit are official acts which will attract s. 114(e) of the Evidence Act 1950 which provides that the court may presume that judicial and official acts have been regularly performed. The words "regularly performed" in the section means

correctly done (see *Commissioners of the Municipality of Malacca v. Sinniah* [1974] 1 MLJ 77). Further, as Richard Talalla J said in *Lim Bua v. Ng Kian Heng* [1993] 2 CLJ 461 at p. 462:

> Section 114 of the Evidence Act (the Act) with its illustration (e) provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case and that judicial and official acts have been regularly performed. The illustration constitutes an application of the *maxim omnia praesumuntur rite esse acta* that is all acts are presumed to have been rightly and regularly done. As stated in *Sarkar on Evidence*, thirteenth edition, page 1037, the foundation for the maxim is that every person whether in his private or official character, does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done.

The signature of a Commissioner for Oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved. Thus in *Jugraj Singh & Anor v. Jaswant Singh & Ors* AIR [1971] SC 761 it was held that the endorsement of a notary public that a power of attorney had been subscribed and sworn before him raises the presumption that he must have satisfied himself in the discharge of his official duties that the person executing it is the proper person. Furthermore, the different pages of an affidavit including the jurat, whether it is on a new page or not, are stapled together and usually filed by a solicitor's firm or a government agency as in this case. It amounts to an official act of a solicitor or the government agency concerned. So it must be presumed that the jurat, even though on a new page, relates to the affidavit in question unless the contrary is proved.

One further matter that requires consideration is whether a jurat must carry with it the title of the action pursuant to the judgment in *Han Euu Tiam v. Phang Kui Fatt & Ors* [1999] 4 CLJ 395; [1999] 4 MLJ 683. If it is so then the affidavits in this case will be defective as they do not have the title. In *Han Euu Tiam* it was held that the jurat must have the title of the action by virtue of the presence of the words "(Title as in action)" appearing at the top of Form 78 of the RHC. In my opinion the need to incorporate the title of the action in the jurat is guided by the heading of Form 78 of the RHC itself which reads as follows:

> FORMS OF JURAT (O. 41 r. 1)

The presence of the words in brackets means that the forms provided have in contemplation the whole of O. 41 r. 1 of the RHC. Thus the rule must be read as a whole in order to determine whether the words "(Title as in action)" refer to the jurat or the affidavit itself. In this regard the part of O. 41 r. 1 that warrants consideration is sub-r. (1) which reads as follows:

> Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

This is the only part of O. 41 r. 1 of the RHC which makes reference to the title of the cause or matter. As Form 78 relates to the whole of O. 41 r. 1 of the RHC it must be read together with the sub-rule. It follows that the words "(Title as in action)" relate to the affidavit. Thus what must carry the title of the action is the affidavit and not the jurat.

Thus I hold, and with respect, that the fact that the jurat commences on one page and ends on another or that it is on a completely new page does not render the affidavit defective unless there is evidence to the contrary. I also hold, and with respect, that there is no requirement in O. 41 r. 1 of the RHC or in Form 78 for the jurat to be entitled. Accordingly, I must presume that the three affidavits in question are regular. However, the indorsement required by O. 41 r. 9(2) of the RHC in all the three affidavits is in the following form:

> Afidavit ini difailkan oleh Peguam Kanan Persekutuan bagi pihak Responden-Responden yang beralamat di Pejabat Peguam Kanan Persekutuan, Kementerian Dalam Negeri, Jalan Dato Onn, 50546 Kuala Lumpur.

This indorsement is defective as it does not state the dates of swearing and filing of the affidavits. However, as provided by the rule referred to the affidavits, even though defective, may be used with leave of court. But no application has been made by the respondents for leave to use the affidavits. That compels me to order that the affidavits cannot be used.

I shall now deal with the objection raised by the learned senior federal counsel. It is based on s. 367 of the Criminal Procedure Code ("the section") which reads as follows:

> The affidavit required by the last preceding section shall be made by the person detained or alleged to be detained unless it be shown that by reason of restraint or coercion or other sufficient cause he is unable to make it, in which case it shall be made by some other person.

In this case the affidavit in support of the motion was affirmed by the mother of the applicant. In explaining why she had to affirm the affidavit she said in para. 3:

> Izinkan saya menerangkan di sini bahawa Afidavit ini telah diikrarkan oleh saya dan bukannya Pemohon memandangkan Pemohon kini sedang ditahan di Pusat Pemulihan Simpang Rengam, Johor di mana sekiranya Pemohon mesti dan/atau mengikrarkan Afidavit ini, kesulitan and kelewatan akan timbul untuk membawa Pesuruhjaya Sumpah ke Pusat Pemulihan tersebut kerana ia bukanlah suatu tempat bebas dan ini melibatkan kes *(sic)* yang besar dan tidak termampu oleh saya untuk saya yang tidak berkerja ini.

In *Syed Ali bin Mohamed Kutti* the affidavit in support of the motion was affirmed by the father of the detainee on the ground that it was difficult or inconvenient to bring a magistrate or a Commissioner for Oaths to the detention centre. In rejecting the reason advanced Abdul Wahab Patail J said at p. 452 that:

> … in the context of s. 367 the word 'sufficient' qualifying 'cause' as used, that is, after the words 'by reason of restraint or coercion', must be intended to mean some cause that is out of the control or influence of the applicant. That it is difficult or inconvenient is not therefore a sufficient cause. It must be shown that at least it is impractical or unreasonable to expect it of the applicant. The reason that it is difficult or inconvenient given in the supporting affidavit by the father cannot be accepted and the application must fail.

His Lordship then proceeded to say that even if difficulty or inconvenience is accepted as a "sufficient cause" then there is nothing in the affidavit:

> … to say that for example, the deponent had tried to bring a Magistrate or a Commissioner for Oaths but they had refused or that they required such fees or expenses as are unreasonable or impracticable. In the circumstances, the deponent has failed to show evidence of difficulty or inconvenience to support his assertion so as to allow the deponent's affidavit to be used under s. 367 to support the *habeas corpus* application. Having so failed, the deponent's affidavit cannot be used as supporting affidavit and the application must also on this ground fail.

I fully agree with the view expressed by Abdul Wahab Patail J that the words "sufficient cause" appearing in the section must be interpreted to mean "… some cause that is out of the control or influence of the applicant". This is because the phrase "sufficient cause" is preceded by the word "other" which, on the application of the *ejusdem generis* rule of construction, must be interpreted in line with the phrase "restraint or coercion". The latter phrase refers to something that is out of the control or influence of a detainee and thus the words "other sufficient cause" must be given a similar meaning. However, I take the affirmative view that difficulty or inconvenience of getting a detainee to affirm the affidavit would fall within the words "other sufficient cause" as it is something that is out of his control or influence. But I wholly agree with the learned

judge's views that there must be positive evidence of the difficulty and inconvenience. I say this because the contents of an affidavit prepared by a person other than a detainee will contain hearsay material. Pursuant to O. 41 r. 5 of the RHC information which is not within the personal knowledge of a deponent is allowed only when an affidavit is affirmed for an interlocutory proceeding and not when a final order is sought (see *Wan Othman bin Datuk Wan Yusuf v. Kewangan Utama (M) Bhd* [1993] 2 CLJ 572; *Kassim bin Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303; *Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor* [1999] 5 MLJ 180). Where there is an application for a final order it is fatal to rely on affidavits containing hearsay evidence (see *Lim Yew Sing v. Hummel International Sports & Leisure A/S* [1996] 4 CLJ 784; [1996] 3 MLJ 7). As an application for *habeas corpus* is final in nature the affidavit in support must not contain hearsay material. Ordinarily, therefore, an affidavit in support of an application for *habeas corpus* must be affirmed by a detainee himself. However, this rule has been modified in the case of *habeas corpus* applications by the section which permits persons other than a detainee to affirm affidavits in view of difficulties that may be encountered thus permitting such affidavits to contain hearsay material. As the section is an exception to the general rule it must be strictly construed. This view is supported by the use of the word "shown" in the phrase "unless it be shown" appearing in the section which is a reference to proof. In saying this I refer to *Black's Law Dictionary* 7th edn which defines the word "show" as:

> To make (facts, etc) apparent or clear by evidence; to prove.

Thus there must be positive proof of difficulty, inconvenience and financial inability in the detainee himself affirming the affidavit instead of a mere possibility as deposed to in this case. As the reasons advanced by the applicant's mother to explain why she had to affirm the affidavit do not satisfy the requirements of the section I am unable to accept it. Furthermore, the indorsement to the affidavit is defective as it does not show the dates of swearing and filing it. No application was made for leave of court to use the affidavit. Again the affidavit cannot thus be used. The motion is therefore left without any affidavit to support it.

In the upshot I dismiss the motion